

STATE OF TENNESSEE

Office of the Attorney General



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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

April 16, 2003

Honorable Sara Kyle
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: In Re: Petition of Tennessee American Water Company to Change and Increase Certain Rates and Charges So As to Permit it to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Water Service to Its Customers
Docket No. 03-00118

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Reply of the Consumer Advocate and Protection Division of the Office of the Attorney General to Tennessee American Water Company's Motion to Compel Responses to Discovery. Kindly file same in this docket. Copies are being sent to all parties of record. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

Shilina B. Chatterjee
Assistant Attorney General

Enclosures

cc: All Parties of Record

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF TENNESSEE
AMERICAN WATER COMPANY TO
CHANGE AND INCREASE CERTAIN
RATES AND CHARGES SO AS TO
PERMIT IT TO EARN A FAIR AND
ADEQUATE RATE OF RETURN ON
ITS PROPERTY USED AND USEFUL IN
FURNISHING WATER SERVICE TO
ITS CUSTOMERS**

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**REPLY OF THE CONSUMER ADVOCATE AND PROTECTION DIVISION OF
THE OFFICE OF THE ATTORNEY GENERAL TO TENNESSEE AMERICAN
WATER COMPANY'S MOTION TO COMPEL RESPONSES TO DISCOVERY**

Comes Paul G. Summers, the Attorney General & Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter "CAPD") and hereby responds to Tennessee American Water Company's (hereinafter "TAWC") Motion to Compel Responses to Discovery (hereinafter "Motion to Compel") dated April 11, 2003.

It should be noted that the CAPD has responded to the original discovery requests of TAWC dated March 26, 2003 under separate cover. However, the CAPD has limited its responses based on our objections filed on April 7, 2003. Nevertheless, the issues raised by TAWC in its Motion to Compel warrant a response by the CAPD and we hereby respond to its Motion to Compel. The CAPD must reiterate that it is unable to answer many of the discovery requests thoroughly and in its entirety at this time due to the unavailability of complete and comprehensive information concerning this matter. Moreover, the discovery process just began and the CAPD has limited information, but is gathering additional information through the

discovery process. Therefore, the CAPD is unable to answer TAWC's discovery requests without further information and review of the responses to the discovery requests served upon TAWC. As TAWC correctly indicated in its Motion to Compel, the CAPD has consistently maintained that it is willing to comply with its discovery obligations and the CAPD agrees that it anticipates responding more thoroughly as more information becomes available and after a proper opportunity to review this matter following receipt of TAWC's responses to the CAPD's discovery request.

Nevertheless, it is important that the CAPD point out that objections to the discovery requests were filed because it was essential that objections are raised. Further, all objections raised are valid and were made in good faith. Tennessee Rules of Civil Procedure provide that a party must raise their objections to discovery, otherwise they are waived.. Where the party cannot respond to an interrogatory, the Tennessee Rules of Civil Procedure state that a party may object to the request and state the reasons for the objection.¹

TAWC made various assertions concerning our objections in its Motion to Compel. Specifically, the TAWC stated that the objections were "vague, general and boilerplate" and had no bases. The CAPD disputes this characterization by TAWC in its Motion to Compel. Also, TAWC stated that CAPD does not have a right to limit our responses. The CAPD believes that it can limit its responses based on law and practical considerations and therefore, TAWC's Motion to Compel should be dismissed.

The scope of discovery is to obtain relevant information. TENN. R. CIV. P. 26.02 states:

Rule 26.02 Discovery Scope and Limits.

¹ TENN. R. CIV. P. 33.01.

(1) IN GENERAL. Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objections that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This allows the parties to obtain any information during discovery that is relevant and not privileged. TENN. R. CIV. P. 26.02(1). There are limits concerning the scope of discovery and TENN. R. CIV. P. 26.02(1) provides that a court shall limit discovery of information when it is unreasonably cumulative or duplicative, obtainable from other sources, or unduly burdensome.

The CAPD would like to stress to the hearing officer that discovery can be limited and the Tennessee Rules of Civil Procedure acknowledge that discovery has limitations and can be limited by the court. Rule 26.02(1) states that discovery shall be limited by the court if it determines that: the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations of the parties' resources, and the importance of the issues at stake in the litigation." Notwithstanding the above, the CAPD has provided substantial explanation to TAWC concerning practical considerations in this case and other limitations that are interfering with providing complete answers to TAWC's discovery requests.

TAWC's discovery requests exceed the proper scope of discovery. In particular, TAWC's discovery requests concerning experts goes beyond the procedures described in TENN.

R. CIV. P. 26.02(4)(A)(i) as follows:

(4) **Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In the spirit of cooperation, CAPD's responses to the expert interrogatories go well beyond "identify," "state the subject matter," "state the facts and opinions" and provide a "summary" as specified in TENN. R. CIV. P. 26.02(4)(A)(i).

In TAWC's Motion to Compel, it stated that its discovery requests were for the purpose of determining what objection or opposition the CAPD had to the requested rate increase. The CAPD clearly stated in its Petition to Intervene dated February 25, 2003, the purposes for intervention. Based upon the documents filed by TAWC, the CAPD determined that it objected to and opposed TAWC's petition concerning its rate increase and it is obvious that a petition to intervene was based on the documents filed by TAWC.

TAWC asserts that the CAPD has not asserted an objection or opposition to TAWC's proposed rate increase. A cursory reading of the Attorney General's Petition to Intervene reveals the heart of the Consumer Advocate's opposition to this rate increase. On page 2, paragraph 2 of the petition to intervene clearly states the basis for objecting to TAWC's petition for a rate increase and specifically states an objection concerning the amount of the rate increase. Additionally, the CAPD cited that the basis for the objection was the review of TAWC's petition

and its additional filings in support of that increase. The CAPD has not hidden or concealed its reasons for intervention and the basis for intervening in this matter.

In addition, under the traditional practices and procedures of the TRA, discovery is not granted without a party demonstrating a need for discovery. In this matter, the overall scope of information that TAWC is seeking is unreasonably cumulative, duplicative, obtainable from another source and unduly burdensome. TAWC has access to the information it is seeking from the CAPD concerning our bases for intervention and some of the other related discovery requests by TAWC.

The purpose of discovery is to allow for discovery of facts which “will enable litigants to prepare for trial free from the element of surprise . . .” *Strickland v. Strickland*, 618 S.W. 2d 496, 501 (Tenn. Ct. App. 1981). The Motion to Compel the CAPD’s responses to discovery was unnecessary. The CAPD provided our objections to TAWC with ample explanation. Furthermore, there are practical limitations that must be considered in this matter. Most importantly, there is no element of surprise for TAWC. The CAPD has raised the appropriate and necessary objections and provided TAWC with comprehensive and satisfactory explanations concerning those objections.

Further, it is well known that pretrial discovery is used to uncover information that will assist in defining or clarifying the issues in the case or that will illuminate issues for a court in the administration or adjudication of the case.² The purpose of discovery is “to narrow and clarify the basic issues between the parties . . .”³ The CAPD has already set forth the basic issues

² 6 Moore's Federal Practice, §26.41[6][a], 26-115 (3rd ed.).

³ *Interborough News Co. v. Curtis Publishing Co.* (S.D.N.Y. 1953) 14 FRD 408, 410.

concerning TAWC's petition to change and increase its rates and charges.

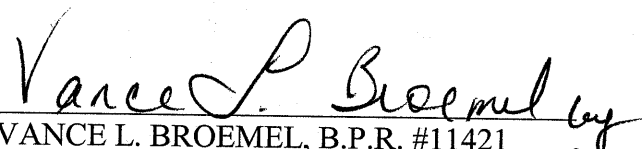
It is not unreasonable for the CAPD to state that it is unable to respond to TAWC's discovery requests in its entirety at this time because it does not have all of the information as of yet. Additionally, due to the nature of TAWC's discovery requests, the CAPD is unable to respond to some of its discovery requests.

Discovery was designed to prevent the tactic of ambush by trial. At its heart, discovery is a process that allows neither party to employ evidence in a trial that the opposing party has never examined. There can be no ambush in this matter when the documents and facts are on the record which is open and available for inspection to the general public.

CONCLUSION

For the reasons provided above, the Attorney General respectfully requests that the TRA deny TAWC's Motion to Compel Further Responses by the Consumer Advocate & Protection Division of the Office of the Attorney General.

RESPECTFULLY SUBMITTED,


VANCE L. BROEMEL, B.P.R. #11421
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
(615) 741-8733



SHILINA B. CHATTERJEE, B.P.R. #20689

Assistant Attorney General

Office of the Attorney General

Consumer Advocate and Protection Division

P.O. Box 20207


Nashville, Tennessee 37202

(615) 532-3382

Dated: April 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid, to T.G. Pappas, George H. Masterson, R. Dales Grimes, Attorneys at Law, Bass, Berry & Sims, PLC, AmSouth Center, 315 Deaderick Street, Suite 2700, Nashville, Tennessee 37238-3001, on this 16th day of April, 2003.


SHILINA B. CHATTERJEE
Assistant Attorney General

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